STATE OF MICHIGAN

COURT OF APPEALS

ERIC KELLY,

Plaintiff-Appellee,

v

GALAXY INDUSTRIES CORPORATION,

Defendant-Appellant.

UNPUBLISHED
October 23, 2003

No. 241814
Wayne Circuit Court
LC No. 01-117267-NO

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted an order granting in a part and denying in part defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) with regard plaintiff's claim under the intentional tort exception to the Worker's Disability Compensation Act, MCL 418.131(1). We reverse and remand.

Plaintiff began work for defendant on March 6, 2000, through a temporary employment agency. Plaintiff received training on operation of a broach press and operated the machine for five days prior to his injury. Plaintiff acknowledged placing a part on the broach table when "something" closed on his hand and pulled him "into the machine." Plaintiff activated the emergency stop button, but could not recall whether he had pushed the side buttons that are used to initiate the machine's cycling. Plaintiff's only recall of machine malfunction, prior to his accident, was the machine spontaneously shutting down.

An employee of defendant testified that he had trained plaintiff on use of the broach press and had indicated to plaintiff several times, as a safety warning, that the machine would cycle independently. The employee indicated he had not seen the broach press cycle independently while training plaintiff. The employee indicated he had reported the machine's malfunction repeatedly to defendant's management for two years prior to plaintiff being hired. The employee reported the machine worked correctly for several weeks after maintenance crews rewired it, but that the machine would spontaneously cycle on an intermittent or variable schedule the month prior to plaintiff's employment with defendant. The employee indicated that his last conversation with defendant's management regarding the machine independently cycling occurred approximately two weeks prior to plaintiff's injury. Other employees of defendant testified that the machine would cycle independently if left to idle for extended time periods but that no other employees had been injured while using the machine. There was no evidence

presented that the machine cycled on its own between the time of its last repair and plaintiff's injury.

On appeal, defendant contends the trial court erred in failing to grant summary disposition pursuant to MCR 2.116(C)(10) because the facts and testimony presented fail to satisfy the requirements of the intentional tort exception to the Worker's Disability Compensation Act. Defendant contends that plaintiff failed to show defendant engaged in a "deliberate act" and "specifically intended an injury." In addition, defendant argues the evidence presented failed to show defendant had actual knowledge that an injury was certain to occur and willfully disregarded the information. We agree.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 516; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is sufficient factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In deciding a motion for summary disposition under this section of the court rule, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the non-moving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when the moving party is entitled to judgment as a matter of law, or the affidavits or other proofs show that there is no genuine issue of material fact. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Review is limited to the evidence presented to the trial court at the time the motion was decided. *Pena v Ingham County Road Comm*, 255 Mich App 299, 313; 660 NW2d 351 (2003).

MCL 418.131(1) defines benefits provided under the Worker's Disability Compensation Act to be the exclusive remedy for work-place injuries and occupational diseases, and further provides:

> The only exception to this exclusive remedy is intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

The seminal case interpreting and defining the language of the statute is *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 180; 551 NW2d 132 (1996). In interpreting the Legislative intent of the second sentence of MCL 418.131(1) it was determined the phrase "deliberate act" was intended to include both acts and omissions. *Travis, supra* at 169. The term "specifically intended an injury" is defined as meaning an employer must "have had in mind a purpose to bring about given consequences." *Id.*

The "intent to injure" provision is further broken down into specific terms, within the third sentence of the statute. MCL 418.131(1). These terms also require definition. First, it must be proven that an employer had "actual knowledge" which is explained as follows:

> [C]onstructive, implied, or imputed knowledge is not enough. Nor is it sufficient to allege that the employer should have known, or had reason to believe, that

> injury was certain to occur. A plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do. [*Travis, supra* at 174.]

Second, it is necessary to interpret the term "certain to occur" which is interpreted as follows:

> The legislative history requires us to interpret 'certain to occur' as setting forth an extremely high standard. When an injury is 'certain' to occur, no doubt exists with regard to whether it will occur. Thus, the laws of probability, which set forth the odds that something will occur, play no part in determining the certainty of injury. . . . [C]onclusory statements by experts are insufficient to allege the certainty of injury contemplated by the Legislature. [*Id.*]

Further, as part of this analysis:

> A . . . question under the certainty requirement, closely related to the actual-knowledge requirement, is the level of awareness an employer must possess: is it enough that the employer know that a dangerous condition exists, or must the employer be aware that injury is certain to occur from what the actor does? We find the latter interpretation the proper one. [*Id.* at 176.]

The third and final term requiring definition is "willfully disregards." The term must be viewed in context of the statute's entire paragraph. And *Travis, supra* provides:

> Because the purpose of the entire second sentence is to establish the employer's intent, we find that the use of the term 'willfully' in the second sentence is intended to underscore that the employer's act or failure to act must be more than mere negligence, that is, a failure to act to protect a person who might foreseeably be injured from an appreciable risk of harm. An employer is deemed to have possessed the requisite state of mind when it disregards actual knowledge that an injury is certain to occur. [*Id.* at 178-179.]

The state of mind of an employer can be inferred from its acts or omissions when no direct evidence exists of the employer's intent to injure. *Id.* at 172-173.

In summary, when reading the entire paragraph of the statute, MCL 418.131(1), to meet the threshold requirement for the intentional tort exception to the Worker's Disability Compensation Act it must be shown that:

> [a]n employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent. The second sentence then allows the employer's intent to injure to be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge. [*Travis, supra* at 180.]

In the present case, plaintiff argues that a continuously dangerous condition existed. Plaintiff contends defendant had ongoing prior knowledge the broach press cycled independently

and that injury was certain to occur due to the machine's malfunction. Further, plaintiff asserts defendant willfully disregarded the knowledge that an injury was certain to occur.

The facts of this case, even when viewed in a light most favorable to plaintiff, do not support plaintiff's contention that a continuously dangerous condition existed. Testimony existed that defendant undertook repairs to the press which would, at least, temporarily resolve the problems. Further not all reports of malfunctioning involved the independent cycling of the machine, but rather, many referenced only breakdowns where the machinery would not operate. At worst, the testimony relied upon by plaintiff indicates an intermittent problem with the machinery cycling independently. Defendant undertook repairs to the equipment the week prior to plaintiff's use and plaintiff successfully used the equipment, without a cycling problem, for four to five days prior to his injury. Based on the performance of the equipment, following repair, defendant did not have actual knowledge the machine would again malfunction or that an injury would be certain to occur.

Defendant contends the circumstances of this case are consistent with the facts of *Travis, supra.* In *Travis, supra* a press that cycled without the plaintiff pressing the control buttons injured the plaintiff. *Id.* at 155. While the press had not improperly cycled during her use of the machine, the plaintiff was unaware that problems had existed with the machine's functioning for almost a month immediately prior to her injury. *Id.* Testimony of the defendant's staff indicated repairs had been undertaken on the machine every time the condition was reported. *Id.* at 155-156. The repairs would temporarily correct the problem and the machine would function correctly for days or even weeks before again improperly cycling. *Id.* at 155. Injury had always previously been avoided. *Id.* at 155-156. Testimony further indicated that a report of the machine malfunctioning had occurred the day prior to the plaintiff's injury but that the defendant's management ignored the request to shut down the machine and allowed it to continue to operate. *Travis, supra* at 155-156. The trial court granted the defendant's motion for summary disposition indicating the facts failed to show the defendant had the intent required or knew that an injury was certain to occur. *Id.* at 157. The Court of Appeals reversed and determined that sufficient facts existed to comprise an intentional tort.

> It reasoned that [defendant] had been informed that the press was double cycling, that it was dangerous, and that someone would be hurt if it was run. [Defendant] failed to shut down the machine in order to make the proper repairs because doing so would take too long and the machine was needed to produce parts. [*Id*.]

The Michigan Supreme Court reversed the Court of Appeals and reinstated the trial court's order granting summary disposition. Our Supreme Court found that the plaintiff had demonstrated the actual knowledge prong of the test, as the defendant in *Travis, supra,* had been informed of the machine's malfunctioning. However, the Supreme Court determined that there was no knowledge that an injury was certain to occur. *Id.* at 182-183.

As noted, the "certain to occur" standard is extremely high. No doubt can exist the injury will occur. *Travis, supra* at 174. A high probability is not sufficient. Plaintiff cannot meet the standard necessary for an intentional tort claim. Plaintiff fails to demonstrate defendant's actual knowledge that an injury was certain to occur. See *Id.* at 182-183. While defendant was aware of prior problems with the press independently cycling, repairs had been undertaken and no current reports of malfunction had been made prior to plaintiff's injury. The injury was not

"certain to occur" as there were no prior reports of injury in the use of this machine. The machine functioned correctly the majority of the time. The problems with the broach press did not comprise a continuously dangerous condition. Plaintiff's own experience of working without incident for four to five days on the machine is contrary to his position. Finally, defendant did not ignore the complaints of machine malfunction and willfully disregard the potential for injury. See *Travis*, *supra* at 178-179. Repairs were undertaken following complaints of the machine improperly cycling. Even if the repairs undertaken were inadequate or negligent it is not sufficient to meet the threshold of absolute certainty necessary to infer the requisite state of mind for the employer to intend an injury. See *Id.* at 174, 180.

The facts alleged by plaintiff and evidence presented in this case are insufficient, as a matter of law, to comprise an intentional tort. While a factual issue may exist regarding whether defendant had actual knowledge of the machine's malfunction based on discrepancies in witness testimony pertaining to the frequency of reports of problems with the equipment, plaintiff fails to meet the necessary threshold for the certainty of an injury to occur and defendant's willful disregard of information that an injury was certain to occur. See *Id* at 180.

Reversed and remanded for entry of an order granting defendant's motion for summary disposition on all counts. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Jane E. Markey